TRENDS IN INTERNATIONAL LAW LITIGATION: AN AUSTRALIAN PERSPECTIVE

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I Introduction

1. In late 2021, in a journal article entitled "International Law before United Kingdom Courts: A Quiet Revolution",[1] Lord Lloyd-Jones, Justice of the Supreme Court of the United Kingdom, identified four legal developments underpinning a marked increase in the determination of questions of international law in the UK courts. Reading that excellent article, and conscious of a substantial body of cases in the High Court of Australia raising international law issues, I wondered about the extent to which developments of the kind identified by Lord Lloyd-Jones may also be apparent in Australia.

2. The four legal developments identified by Lord Lloyd-Jones were: (1) the evolution of international law to embrace individuals as subjects; (2) the profound influence of the European Convention on Human

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1 (2022) 71 *International and Comparative Law Quarterly* 503.

Rights through the *Human Rights Act 1998* (UK), requiring UK courts not merely to give effect to the UK's treaty obligations under the Convention, but also to rule on issues that had previously been considered to be non-justiciable;[2] (3) the growing willingness of UK judges to adjudicate upon the conduct of foreign states and issues of public international law; and (4) the accompaniment of these developments by a shift in attitudes to customary international law and the common law.

3. In this lecture, prompted by Lord Lloyd-Jones' article, I want to focus on two themes. Today's lecture is accordingly split into two main parts.

4. First, consistently with Lord Lloyd-Jones' observation that the engagement of the courts with issues of international law has increased greatly, I will discuss recent international law developments in the High Court of Australia, Australia's highest appellate court. Specifically, I will outline five cases decided by the High Court recently, which raised issues concerning international law. I will also mention another case that were argued late last year. In doing so, I will note relevant UK decisions.

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2 Such as whether the UK's Ministry of Defence owed a duty of care to its service men and women during operations that occurred outside the UK: *Smith v Ministry of Defence* [2013] UKSC 41; [2014] AC 52.

5. In the second part of the lecture, I will consider the evolution of international law in Australia and examine whether, and the extent to which, Australia has experienced legal developments like those that have occurred in the UK. As I will explain, my conclusion is that the Australian experience is similar in some respects and different in others.

6. My aims are to stimulate your interest in Australian decisions involving international law, and to capture the illuminating but sometimes subtle distinctions between Australian and UK case law. My hope is that today's discussion will be to the benefit of your work in addressing international law issues in the United Kingdom.

II International Law in the High Court of Australia: Recent Decisions

(1) Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.[3]

7. Last year's decision of the High Court in *Kingdom of Spain* arose from an application for registration and enforcement of an award given by a tribunal established in Paris under the *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (1965) (**ICSID Convention**). That Convention is

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3 [2023] HCA 11; (2023) 275 CLR 292.

substantially incorporated into Australian law by the *International Arbitration Act 1974* (Cth).[4]

8. The respondents, two companies incorporated respectively in Luxembourg and the Netherlands, had invested in the Spanish renewable energy market in reliance on regulatory measures aimed at incentivising investment in Spain's renewable energy industry. After a new Spanish government revoked the incentives, the value of those investments was substantially diminished. The respondents commenced arbitral proceedings against Spain under the Energy Charter Treaty (1994) pursuant to the ICSID Convention. The underlying dispute concerned whether Spain had failed to accord fair and equitable treatment to the companies' investments in breach of Art 10(1) of the Treaty. Following the arbitration in Paris, in which Spain participated, the companies obtained an award in their favour of 101 million euros. The companies sought to have the award recognised and enforced against Spain in Australia as if it were a final judgment of an Australian court. Spain opposed the claims, arguing that, as a foreign state, it was immune from the jurisdiction of the courts of Australia.

9. Article 54(1) of the ICSID Convention, to which Australia is a signatory and which has domestic force of law, provided that each contracting state "shall recognise an award rendered pursuant to the

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4 Section 32. In the UK, see *Arbitration (International Investment Disputes) Act 1966* (UK) s 1.

ICSID Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that state". A principal issue before the High Court was whether Spain, as the subject of a binding ICSID arbitral award, had waived its foreign state immunity under the *Foreign States Immunities Act 1985* (Cth). That Australian Act is similar, although not identical, to the UK's *State Immunities Act 1978*.

10. The High Court commenced its reasoning by outlining the principle, also applied in the United Kingdom,[5] that, so far as possible, statutes should be interpreted to be consistent with international law.[6]

11. Spain argued that it is well established at international law that any waiver of its foreign state immunity could only be express, and not implied, and cited opinions of the International Court of Justice, the International Law Commission and the House of Lords judgment in *Pinochet (No 3)*.[7] The High Court construed the relevant authorities, concluding that any insistence that a waiver be "express" should be understood as requiring only that it be derived from the express

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5 *R v (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26; [2008] AC 153 at 192 [45].

6 [2023] HCA 11; (2023) 275 CLR 292 at 307 [16].

7 *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 3)* [1999] UKHL 17; [2000] 1 AC 147, cited in *Kingdom of Spain* [2023] HCA 11; (2023) 275 CLR 292 at 309-310 [22].

words of the international agreement, whether as an express term or as a term implied for reasons including necessity.[8]

12. The Court also had to untangle the meaning of the concepts of recognition, enforcement and execution in the ICSID Convention. For that purpose, the Court had regard to the United States Restatement of the Law concerning International Commercial and Investor-State Arbitration, commentary from the original architect of the Convention and the drafting history of the provisions in the travaux préparatoires.[9]

13. Having regard to the primary purpose of the ICSID Convention, namely, to promote the flow of private capital to sovereign nations by the mitigation of sovereign risk, the Court identified an assumption, underlying the ICSID Convention, that participating nation states would abide by arbitral outcomes. The Court also observed that Art 53(1) restated customary international law, in saying that each contracting state "shall abide by and comply with the terms of" an ICSID Convention award.[10]

14. The High Court rejected an argument made by Spain that there was a difference in the meaning of the English text of Arts 53-55 and the French and Spanish texts. The Court reasoned that the texts each

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8 [2023] HCA 11; (2023) 275 CLR 292 at 310-311 [25].

9 [2023] HCA 11; (2023) 275 CLR 292 at 319-325 [45]-[58].

10 [2023] HCA 11; (2023) 275 CLR 292 at 329 [71].

make a distinction between the interchangeable concepts of recognition and enforcement of an arbitral award on the one hand and execution on the other.[11] Ultimately, the High Court agreed with the courts below that recognition and enforcement of the ICSID Convention award did not affect any foreign state immunity of Spain from laws pursuant to which the award might be executed against Spain.

15. In parallel proceedings in England and Wales,[12] Spain tried unsuccessfully to set aside the registration of the ICSID Convention award under Parts 62.21(2)(b) and 74.3(2)(b) of the *Civil Procedure Rules 1998* (UK). Then Mr Justice Fraser was provided with the Australian High Court's judgment and observed:[13]

> "[O]ne must obviously take account of the slightly different domestic statutes involved. However, even without deploying that decision as an authority of weight, the claimants are entitled to rely upon what is its conventional analysis of legal principle, including international treaty obligations such as Spain being a state that is party both to the [Energy Charter Treaty] and the ICSID Convention, to support its case. Regardless of that, the outcome of that appeal does not, in my judgment, affect or impinge upon the analysis of the correct approach to be applied by this court on the law in this jurisdiction on the application by Spain to set aside the Order. I would characterise it as separate free-standing support, in the highest appellate court of another common law jurisdiction, for the analysis which I

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11 [2023] HCA 11; (2023) 275 CLR 292 at 326-327 [62]-[64].

12 *Infrastructure Services Luxembourg SARL v Kingdom of Spain* [2023] EWHC 1226 (Comm).

13 *Infrastructure Services Luxembourg SARL v Kingdom of Spain* [2023] EWHC 1226 (Comm) at [116].

have undertaken. Both my analysis and that in Australia are consistent, and reach the same conclusions."

16. After reviewing the High Court's decision, and decisions of United States courts, Fraser J concluded:[14]

> "The ratio and decisions in other countries are potentially persuasive and of interest, but as I noted, plainly they do not bind this court. It is however heartening, in terms of the integrity of international treaties, and the purpose and applicability of the ICSID Convention and international arbitration under it, that both in Australia and also the District of Columbia, those jurisdictions have adopted broadly the same analysis as I have. The near-identical conclusion of the highest court in Australia, and its findings of the lack of state immunity there, due to the existence of a binding arbitration agreement, demonstrate in my judgment that my conclusion is correct."

17. The decision in *Kingdom of Spain* is an example of how international law generates individual rights that can be enforced against nation states. In practical terms, the effect of the ICSID Convention, as incorporated into Australian law, was to permit companies incorporated in Luxembourg and the Netherlands to enforce an arbitration award declared in France against the Kingdom of Spain in Australia.

18. Mr Justice Fraser's consideration of the High Court of Australia's decision in England and Wales also illustrates cognisance of the value of international consensus over how a treaty (or a particular provision within it) should be construed, when that treaty is

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14 *Infrastructure Services Luxembourg SARL v Kingdom of Spain* [2023] EWHC 1226 (Comm) at [119].

incorporated into a domestic statute to give effect to international law rights. As has been recognised by the Full Court of the Federal Court of Australia, "it is obviously desirable that expressions used in international agreements should be construed, as far as possible, in a uniform and consistent manner by both municipal [c]ourts and international [c]ourts".[15] It follows that, while international court decisions will not be binding on a domestic court, they will usually serve as a useful analytical tool in any interpretation exercise and may ultimately add further support to a court's final determination.

19. The High Court's decision in *Kingdom of Spain* was delivered only five months before the UK Supreme Court's judgment in *Republic of Mozambique v Privinvest Shipbuilding SAL (Holding)*,[16] which found in Mozambique's favour on a question about the scope of certain arbitration agreements, for the purpose of deciding whether proceedings brought by Mozambique in the United Kingdom should be stayed. In that case, Lord Hodge (with whom the other members of the Court agreed) commenced his analysis by observing that "English law, like many other legal systems, adopts a pro arbitration approach".[17] After examining international authority, including case law from Hong Kong, Singapore, Australia and the Cayman Islands, Lord Hodge identified a "general international consensus among the

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15 *Rocklea Spinning Mills Pty Ltd v Anti-Dumping Authority* (1995) 56 FCR 406 at 421; (1995) 129 ALR 401 at 415.

16 [2023] UKSC 32.

17 [2023] UKSC 32 at [45].

leading jurisdictions involved in international arbitration in the common law world which are signatories of the New York Convention on the determination of 'matters' which must be referred to arbitration".[18] Although less explicit than the UK Supreme Court, the Australian High Court's approach in *Kingdom of Spain* reflects the pro-arbitration approach of Australian law.

(2) Wells Fargo Trust Company National Association v VB Leaseco Pty Ltd (Administrators Appointed)[19]

20. The respondent, part of the Virgin Australia airline group, leased aircraft engines from the appellant, Wells Fargo.[20] During the airline industry crisis that arose out of the Covid-19 pandemic in 2020, administrators were appointed to the leasing company. This was a default event under the lease, and Wells Fargo accordingly demanded the redelivery of its engines to a specified location in Florida in the United States.[21] The company administrators refused but offered Wells Fargo the opportunity to take control of the engines at their location in Australia, which was another right available to Wells Fargo under the lease in the event of default.[22]

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18 [2023] UKSC 32 at [71].

19 [2022] HCA 8; (2022) 275 CLR 1.

20 *Wells Fargo* [2022] HCA 8; (2022) 275 CLR 1 at 8 [5].

21 *Wells Fargo* [2022] HCA 8; (2022) 275 CLR 1 at 8-9 [6]-[8].

22 *Wells Fargo* [2022] HCA 8; (2022) 275 CLR 1 at 8-9 [7]-[8].

21. Wells Fargo commenced proceedings in the Federal Court of Australia to compel the redelivery of the engines to Florida, raising questions under the *Convention on International Interests in Mobile Equipment* ("the Convention") and the *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment* ("the Protocol"), both of which are directly enacted into Australian law.[23]

22. The case turned on the content of the obligation to "give possession of the aircraft object to the creditor" imposed by Art XI(2) of the Protocol. At the outset of its reasoning, the High Court noted that the Convention and Protocol "must be construed according to the principles applicable to the interpretation of treaties in international law".[24] By way of background, the High Court has accepted that the Vienna *Convention on the Law of Treaties* is relevant when the Court interprets a treaty.[25] The Court has also previously emphasised that international instruments should be interpreted in a

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23 *International Interests in Mobile Equipment (Cape Town Convention) Act 2013* (Cth) ("the Act"). The Convention and Protocol have been implemented into UK domestic law pursuant to the *International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015* (UK).

24 *Wells Fargo* [2022] HCA 8; (2022) 275 CLR 1 at 7 [1].

25 *Commonwealth v Tasmania* (1983) 158 CLR 1 at 93-94; *Addy v Federal Commissioner of Taxation* [2021] HCA 34; (2021) 273 CLR 613 at 629 [23],citing *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 at 14 [34].

"more liberal manner than would be adopted if the court was required to construe exclusively domestic legislation".[26]

23. Accordingly, in determining the meaning of the obligation to "give possession", the Court had regard to the Official Commentary on the Convention and Protocol distributed by the Governing Council of the International Institute for the Unification of Private Law.[27]

24. The High Court rejected Wells Fargo's argument that the term "give possession" meant that the debtor had to bear the burden of the effort and expense necessary to return the aircraft engines. Having regard to the use of the term in the rest of the Protocol, the Court held that the physical transfer of an aircraft object from a particular territory is different from the notion of "giving or taking possession", which meant "physical control to the exclusion of others".[28] The Court was satisfied that its interpretation aligned with the Official

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26 *Addy v Federal Commissioner of Taxation* [2021] HCA 34; (2021) 273 CLR 613 at 629 [23]. In the UK, it has been accepted that courts will interpret an international treaty "not as static but as open to adapt to emerging norms of international law": *R (Bashir) v Secretary of State for the Home Department* [2018] UKSC 45; [2019] AC 484 at 547 [95], quoting *Case concerning the Gabčikovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7 at [112].

27 *Wells Fargo* [2022] HCA 8; (2022) 275 CLR 1 at 10 [16].

28 *Wells Fargo* [2022] HCA 8; (2022) 275 CLR 1 at 21 [46], 22 [55].

Commentary as well as with the *United States Bankruptcy Code* on which Art XI was based.[29]

25. The High Court observed that the Convention expressly preserved the procedural rules of the forum relating to the enforcement of rights to property under the control of an administrator.[30] This meant that Australian insolvency laws applied, with the effect that Wells Fargo was constrained in exercising its rights under the Convention to demand redelivery of the engines without the consent of the company administrator or leave of the court.[31]

26. Aside from the role of Australian insolvency law in this case, the case adopted an international frame of reference for its decision-making, considering international commentaries and relevant foreign law such as United States law. The Court's decision has real potential to influence international jurisprudence, as the Convention provides that "regard is to be had to … the need to promote uniformity and predictability in its application".[32]

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29 *Wells Fargo* [2022] HCA 8; (2022) 275 CLR 1at 21-22 [51].

30 *Wells Fargo* [2022] HCA 8; (2022) 275 CLR 1at 14 [28].

31 *Wells Fargo* [2022] HCA 8; (2022) 275 CLR 1at 14 [29], 22 [54].

32 Article 5(1). See also Tarnowskyj and Giddings, "Take it or Leave it? The High Court Interprets the Meaning of 'Give Possession' under the Cape Town Convention and Aircraft Protocol" (2022) 22 *Insolvency Law Bulletin* 20 at 22.

(3) R v Jacobs Group (Australia) Pty Ltd[33]

27. In *R v Jacobs Group*, the High Court considered the correct interpretation of a provision imposing penalties for bribery of foreign public officials. The case concerned the sentencing of an Australian company for paying bribes to foreign officials in Vietnam and the Philippines to obtain construction contracts. The relevant provision of the criminal statute stated that if the offence was committed by a corporation, the maximum penalty for the offence was, relevantly, "if the court can determine the value of the benefit that the body corporate … obtained directly or indirectly and that it is reasonably attributable to the conduct constituting the offence - 3 times the value of that benefit".[34] That provision was enacted to implement the OECD *Convention on Combatting Bribery of Foreign Officials in International Business Transactions*. The issue for the Court was whether the "benefit" for the purpose of the provision was the gross sum that the offending company received under the contracts (being approximately $10m) or the net profit after completion of works the subject of the contracts (being approximately $2.7m).

28. Article 3.1 of the Convention provided that "[t]he bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties". An OECD Working Group had adopted a recommendation that Australia increase its fine for the

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33 [2023] HCA 23; (2023) 97 ALJR 595.

34 *Criminal Code* (Cth) s 70.2(5).

offence because it was not considered to be "effective, proportionate and dissuasive".[35] In particular, the OECD review emphasised that a penalty for bribery should not be seen simply as the cost of doing business but had to outweigh the potential benefit from the transaction.[36]

29. In construing the Australian statute, the majority of the High Court noted that the statute must be interpreted to be consistent with the Convention, and that the phrase "effective, proportionate and dissuasive criminal penalties" has a clear genesis and meaning in European law, informing the language of the Convention. In particular, the overall statutory object of "proportionality" is not focused on the relationship between the benefit obtained by the offender from the bribery offence and the size of the penalty. Rather, it means proportionate "to the gravity of the infringement", of which the benefit to the offender may be but one aspect.[37]

30. Accordingly, the Court held that, in quantifying the appropriate penalty, the entire value of the contract obtained should be used, as opposed to simply the profit obtained after subtracting the costs of performing a contract obtained by bribery.[38] This view was reached

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35 [2023] HCA 23; (2023) 97 ALJR 595 at 600 [14].

36 [2023] HCA 23; (2023) 97 ALJR 595 at 600 [14].

37 [2023] HCA 23; (2023) 97 ALJR 595 at 602 [24].

38 [2023] HCA 23; (2023) 97 ALJR 595 at 603 [26]-[29], 608 [55]-[56].

in cognisance of the OECD's concern to prevent the distortion of international competitive conditions, associated with the recognition that, if an advantage is secured by a bribery offence, the *whole* advantage is tainted.[39]

31. Like the High Court of Australia, the UK Supreme Court is conscious of its obligation to promote consistency and certainty in its administration of international regimes which aim to ensure mutual legal cooperation. In *R (KBR Inc) v Director of the Serious Fraud Office*,[40] the Supreme Court considered whether the Serious Fraud Office could use its power under the *Criminal Justice Act 1987* (UK) to compel a foreign company to produce documents in its investigation into suspected offences of bribery and corruption. Lord Lloyd-Jones (writing on behalf of all other members of the Court) held that the UK Act did not have extraterritorial effect.[41]

32. His Lordship noted the Serious Fraud Office's reliance on the OECD Convention to support a broad interpretation of its power to combat bribery of foreign officials to the "fullest extent", without being influenced by considerations such as relations with another nation state.[42] However, his Lordship went on to trace the development of agreements between the United Kingdom and the United States in

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39 [2023] HCA 23; (2023) 97 ALJR 595 at 605 [40]-[41].

40 [2021] UKSC 2; [2022] AC 519.

41 [2021] UKSC 2; [2022] AC 519 at 542-543 [64]-[65].

42 [2021] UKSC 2; [2022] AC 519 at 532 [31].

order to explain that successive Acts of Parliament have developed "structures" in domestic law to permit the United Kingdom to participate in international systems of mutual legal assistance in criminal investigations, the functioning of which was reliant on safeguards and protections including with respect to the use of documentary evidence.[43] Lord Lloyd-Jones observed the "inherent improbab[ility]" that Parliament would have refined this machinery to the extent it did "while intending to leave in place a parallel system for obtaining evidence from abroad which could operate on the unilateral demand of the [Serious Fraud Office] .... without the protection of any of the safeguards put in place under the scheme of mutual legal assistance".[44]

33. Although the Australian High Court in *R v Jacobs Group* was self-consciously enforcing the OECD Convention, and the UK Supreme Court in *R (KBR Inc) v Director of the Serious Fraud Office* declined to apply it, the Courts each displayed concern for international law values. In particular, Lord Lloyd-Jones' explanation of how the imperatives of the OECD Convention do not override its broader adherence to schemes for mutual legal assistance demonstrate that the application of international law does not involve the slavish adherence to international agreements, but a more nuanced understanding of the interaction between domestic, transnational and international legal regimes. Concerning comity in the context of

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43 [2021] UKSC 2; [2022] AC 519 at 536 [45].

44 [2021] UKSC 2; [2022] AC 519 at 536-537 [45].

claims to extra-territorial jurisdiction, Lord Lloyd-Jones quoted the following statement by Australian International law jurist,[45] James Crawford:[46]

> "Comity arises from the horizontal arrangement of state jurisdictions in private international law and the field's lack of a hierarchical system of norms. It plays the role of a somewhat uncertain umpire: as a concept, it is far from a binding norm, but it is more than mere courtesy exercised between state courts."

34. Lord Lloyd-Jones concluded:[47]

> "The lack of precisely defined rules in international law as to the limits of legislative jurisdiction makes resort to the principle of comity as a basis of the presumption [against extra-territorial effect of domestic law] applied by courts in this jurisdiction all the more important. As a result, the presumption in domestic law is more extensive and reflects the usages of states acting out of mutual respect and, no doubt, the expectation of reciprocal advantage. Accordingly, it is not necessary, in invoking the presumption, to demonstrate that the extra-territorial application of the legislation in issue would infringe the sovereignty of another state in violation of international law."

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45 [2021] UKSC 2; [2022] AC 519 at [24] 529.

46 James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 9th ed, 2019) at 21.

47 [2021] UKSC 2; [2022] AC 519 at 529 [25].

(4) Barnett v Secretary, Department of Communities and Justice[48]

35. Appeals to the High Court of Australia are heard by grant of special leave, similar to the requirement of permission to appeal to the UK Supreme Court. In the case of *Barnett*, the High Court revoked the grant of special leave in a case concerning the effect of a declaration made by an Irish court that the father of a child was the child's guardian within the meaning of Irish law concerning guardianship of infants. The child's mother, an Australian citizen, had removed the child from Ireland to Australia without the father's permission. The declaration was relied upon by the courts below to support orders for the return of the child to her habitual residence of Ireland pursuant to the *Convention on the Civil Aspects of International Child Abduction* (1980) ("the Hague Convention").[49]

36. The Hague Convention was given direct effect under Australian law in 1987.[50] Apart from one provision, the Convention has also been enacted as part of UK domestic law since 1985.[51] The nature of the Hague Convention, involving a presumptive mutual respect for the

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48 [2023] HCA 7; (2023) 97 ALJR 206.

49 [1987] ATS 2.

50 *Family Law (Child Abduction Convention) Regulations 1986* (Cth).

51 *Child Abduction and Custody Act 1985* (UK).

legal processes of the other relevant state, has been emphasised by both the High Court of Australia and the UK Supreme Court.[52]

37. For example, the High Court has noted that the Convention is concerned with "reserving to the jurisdiction of the habitual residence of the child in a Contracting State the determination of rights of custody and of access".[53] This was said by the Court to "entail[] preparedness on the part of each Contracting State to exercise a degree of self-denial with respect to 'its natural inclination to its own assessment about the interests of children who are currently in its jurisdiction…'", citing the South African academic, and former lecturer at the University of Oxford, John Eekelaar.[54]

38. Returning to the decision in *Barnett,* the courts below had determined the effect of the Irish court's declaration without the benefit of written reasons or a transcript of the hearing. Shortly before the appeal was listed for hearing in the High Court, a transcript of the Irish court's ex tempore reasons became available, demonstrating the facts underlying the declaration. The transcript made it clear that the Irish court had found the father to have had

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52 See, eg, *In re D* (A Child) [2006] UKHL 51; [2007] 1 AC 619 at 639 [51]; *In re E (A Child)* [2011] UKSC 27; [2012] 1 AC 144 at 160 [30].

53 *De L v Director-General, Department of Community Services (NSW)* (1996) 187 CLR 640 at 648.

54 Eekelaar, "International Child Abduction by Parents" (1982) 32 *University of Toronto Law Journal* 281 at 305 cited in *De L v Director-General, Department of Community Services (NSW)* (1996) 187 CLR 640 at 648-649.

rights of custody in respect of the child at the date of the child's removal. This is what the Australian court below had inferred from the terms of the Irish court's declaration, but was in issue on the appeal to the High Court. In those circumstances, the foundation for the grant of special leave was revoked.

39. Another factor which motivated the Court to revoke special leave was that the mother's appeal against the Irish judgment had been stayed pending her appeal in the High Court. The Court considered that "all issues concerning the jurisdiction of the Irish court and the operation of Irish law are best resolved as part of the appeal in Ireland."[55] The High Court also made comments about procedures the parties could have adopted to achieve a speedier resolution of the proceeding.

40. The UK Supreme Court has approached its application of the Hague Convention in a similar spirit of international legal cooperation. In the 2021 case of *G v G*,[56] the Court addressed the requirements for prompt resolution under the Convention in the context of an abducted child dependent upon a person claiming asylum. Lord Stephens (with whom all the other members of the Court agreed) held that while a return order could not be implemented until the Home Secretary has determined an asylum claim,[57] various steps

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55 [2023] HCA 7; (2023) 97 ALJR 206 at 209 [13].

56 [2021 UKSC 9; [2022] AC 544.

57 [2021] UKSC 9; [2022] AC 544 at 642-644 [128]-[134].

could be taken to coordinate Convention and asylum proceedings so that the internationally endorsed policy intention behind the Hague Convention (ie, the preservation of relationships by ensuring the prompt return of a child) would not be rendered ineffective by the time taken to process an asylum claim. For example, his Lordship suggested that the Home Secretary could intervene in Convention proceedings, the child could be joined as a party to the asylum proceedings with independent representation, and there could be greater cross-disclosure of information between the proceedings.[58] To my mind, this illustrates not only a shared commitment to the Convention, as enacted in each jurisdiction, but a culture of concern for the implementation of the municipal laws in the interests of children and families affected by the Hague Convention.

(5) Carmichael Rail Network Pty Ltd as Trustee for the Carmichael Rail Network Trust v BBC Chartering Carriers Gmbh & Co. Kg[59]

41. In February this year, the High Court decided an appeal concerning the proper construction of Art 3(8) of a version of the *Hague Rules*[60]

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58 [2021] UKSC 9; [2022] AC 544 at [163]-[177].

59 [2024] HCA 4.

60 Being the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (the "Brussels Convention") as amended by the Protocol Amending the Brussels Convention (the "Visby Protocol"), and the Protocol Amending the Brussels Convention, as amended by the Visby Protocol (the "SDR Protocol").

incorporated into Australian law by s 8 of the *Carriage of Goods by Sea Act 1991* (Cth).

42. The case involved a dispute referred to arbitration in London by the carrier of goods under an arbitration agreement contained in a contract of carriage evidenced by a bill of lading, pursuant to which English law was to apply. The shipper commenced proceedings in the Federal Court of Australia claiming damages and an injunction to restrain the London arbitration. The carrier sought a stay of the Australian proceedings and gave an undertaking to the Federal Court "to admit in the London arbitration that the amended Hague Rules in Schedule 1A to the [Australian statute] as applied under Australian law appl[ied to the contract of carriage] and the plaintiff's claims against the first defendant thereunder, and to maintain that admission and position in the London arbitration."

43. The issue for decision was whether the arbitration agreement was rendered inoperative by Art 3(8) of the Hague Rules. Article 3(8) states that any "clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to … goods … or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect". The shipper argued that, to engage Art 3(8), all it needed to show was that the carrier's liability "might" be lessened by the arbitration agreement providing for London arbitration, and that the balance of probabilities standard did not apply.

44. The Court unanimously rejected the shipper's contention and dismissed its appeal. The Court held that Art 3(8) required the shipper to establish, on the balance of probabilities, that the arbitration clause relieved the carrier from liability or lessened such liability otherwise than as provided for by the Australian Hague Rules.

45. At the outset of its reasoning, the Court stated that it is "desirable in the interests of uniformity that [the Australian Hague Rules] should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptation".[61] The Court then observed that, in the common law world, the standard of proof for civil proceedings (namely, proof on the balance of probabilities) is a standard that is at least as onerous as the "preponderance of evidence" standard that is applied in the context of international tribunals generally.[62] Within this overarching conceptual context of the applicable standard of proof in civil proceedings, references to a clause "relieving" a carrier from liability or "lessening such liability" are to be understood as referring to facts able to be found in accordance with the requisite degree of confidence, at the least on the preponderance of the evidence. They are not to be understood as meaning some lesser standard, howsoever it might be formulated,

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61 [2024] HCA 4 at [29], quoting *Stag Line Ltd v Foscolo, Mango and Co Ltd* [1932] AC 328 at 350.

62 [2024] HCA 4 at [31].

still less mere speculation based on unknown and unpredictable future contingencies. That interpretation was said to be consistent with Lord Diplock's reasoning in the 1983 decision, *The Hollandia.*[63]

46. Ultimately, the High Court concluded that if Art 3(8) were engaged by facts that were not proved to at least the ordinary civil standard of proof, the Hague Rules' purpose of providing a transparent and predictable set of international provisions that balance the allocation of the rights and liabilities as between carriers and shippers would be undermined.

47. What is notable about the decision in *Carmichael* is that, even though the High Court was interpreting a provision of a domestic Australian statute, it favoured arguments that were sensitive to the need to maintain the certainty and predictability of the international scheme created by the Hague Rules.

(6) Tesseract International Pty Ltd v Pascale Construction Pty Ltd[64]

48. Finally, in November 2023, the High Court heard an appeal concerning the proper interpretation of a South Australian law that stipulated what rules of law are to govern a dispute that is referred to arbitration in South Australia. The relevant provision is based on

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63 [1983] 1 AC 565 at 575 (emphasis added).

64 Case No. A9/2023.

the UNCITRAL Model Law on International Commercial Arbitration.[65] Judgment has not yet been delivered. However, in this context, it is relevant to note that the argument addressed international approaches, including UK case law, about the identification of the laws required to be applied by an arbitrator to resolve the substance of a dispute.

49. *Tesseract* is the final example of recent High Court cases raising issues of international law. As I explained at the beginning of the lecture, what I propose to discuss now is the evolution of international law in Australia.

III The Evolving Relationship Between International and Domestic Laws in Australia

50. The main development remarked upon by Lord Lloyd-Jones in his recent journal article is the evolution of international law. One aspect of that evolution noted by his Lordship is the change of international law from the system of law governing the conduct of states to incorporate a "new international law" which acknowledges the rights of individuals against all States, including the State of their own nationality.[66] This development is extraneous to the domestic legal systems of Australia and the United Kingdom; although, of course,

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65 *Commercial Arbitration Act 2011* (SA) s 28.

66 Lloyd-Jones, "International Law before United Kingdom Courts: A Quiet Revolution" (2022) 71 *International and Comparative Law Quarterly* 503 at 505-506.

as nation states each country has contributed to the development of international law through treaty negotiation.

51. From an Australian perspective, the changing relationship between Australian domestic laws and international law involves several important strands. I will focus on the way in which Australian domestic law has implemented international law into Australia's legal system, bearing in mind Australian constitutional law; and the fact that Australia does not have a constitutional bill of rights or a federal statutory equivalent to the *Human Rights Act 1998* (UK). I will discuss each of these points in turn, again with reference to relevant UK case law.

(1) The implementation of international law in Australia

52. In common with the UK, Australia has enacted a plethora of legislation to give effect to international law, on subjects such as

consumer protection,[67] cross-border insolvency,[68] international arbitration,[69] and civil aviation.[70]

53. As for the UK, the act of treaty-making is wholly executive in Australia.[71] Following the English common law position, international treaties do not form part of Australian law unless they have been validly incorporated into domestic law by statute.[72] Also similar to the position in the UK, treaties and conventions are either directly

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67 French, "Australia and International Law" (2020) 5 *Perth International Law Journal* 1 at 11.

68 *Cross-Border Insolvency Act 2008* (Cth), where sch 1 gives effect to the *Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law*.

69 *International Arbitration Act 1974* (Cth), where schs 1 and 2 give effect to the *United Nations Conference on International Commercial Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards* and the UNCITRAL Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006).

70 *Civil Aviation (Carriers' Liability) Act 1959* (Cth), where the schedules contain various international agreements including the *Convention for the Unification of Certain Rules for International Carriage by Air* (1999).

71 Harrington, "Redressing the Democratic Deficit in Treaty Law Making: (Re-)Establishing a Role for Parliament" (2005) 50 *McGill Law Journal* 465 at 473. In Australia, the executive power to negotiate and enter into treaties resides in s 61 of the Constitution.

72 *Koowarta v Bejelke-Petersen* (1982) 153 CLR 168 at 211-212, 224-225; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286-287; Rothwell, "Australia" in Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge University Press, 2009) 120 at 128.

incorporated into a domestic law,[73] or the legislature may rewrite the obligations from international treaties into a separate statutory regime with the international instrument annexed to the domestic legislation as an aid to interpretation.[74]

54. However, an important difference between the UK and Australia is that, in Australia, Commonwealth legislative power to implement treaties is conferred on the federal Parliament by s 51(xxix) of the Constitution, which is the power to make laws with respect to "external affairs" and is accordingly confined by that head of power. The High Court exercises relatively limited judicial oversight with respect to the Executive's act of entering into conventions or the Parliament's act of implementing international law into domestic legislation. The only real limit on the Parliament's treaty-implementing power is that the domestic law carries out the treaty's purpose in a manner which is "capable of being reasonably considered appropriate and adapted" to giving effect to Australia's treaty obligations.[75] Consistently with the separation of powers, the

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73 See, eg, the *International Arbitration Act 1974* (Cth) directly incorporating the *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (1965).

74 See, eg, the *Racial Discrimination Act 1975* (Cth); Opeskin and Rothwell, "The Impact of Treaties on Australian Federalism" (1995) 27 *Case Western Reserve Journal of International Law* 1 at 7.

75 *Commonwealth v Tasmania* (1983) 158 CLR 1 at 130-131 (Mason J), 172 (Murphy J), 232 (Brennan J), 259 (Deane J). See also Rothwell, "Australia" in Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (2009) 120 at 153.

High Court will not rule on non-justiciable political questions, such as whether (as arose in a previous case), the Executive government breached international conventions by failing to impose controls upon military exports to "repressive" foreign governments.[76]

55. The constitutional validity of Australian legislation does not depend on its conformity with an international convention signed by Australia if the convention has not been given statutory effect.[77] So, for example, obligations, assumed by the Executive government under the ICCPR not to infringe the right to freedom of association, did not invalidate a State law against habitually consorting with convicted offenders.[78]

56. Even so, absent incorporation into domestic law, the existence of a convention obligation may still be relevant to statutory interpretation. Shortly after its establishment, the High Court of Australia recognised a general presumption that legislation is to be interpreted so far as language permits as "not to be inconsistent with the comity of nations or with the established rules of international law", relying on the British text, *Maxwell on the Interpretation of Statutes*,

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76 *Re Limbo* (1989) 64 ALJR 241 at 243.

77 *Tajjour v New South Wales* [2014] HCA 35; (2014) 254 CLR 508 at 554 [48] (French CJ), 567 [96] (Hayne J), 576 [136] (Gageler J), 606 [246]-[248] (Keane J).

78 *Tajjour v New South Wales* [2014] HCA 35; (2014) 254 CLR 508 at 554 [48] (French CJ), 567 [96] (Hayne J), 576 [136] (Gageler J), 606 [246]-[248] (Keane J).

and an 1884 decision of the United States Supreme Court.[79] That principle was restated by the House of Lords in 2008.[80]

57. Australian courts have also favoured constructions of domestic legislation which accord with Australia's obligations under a treaty.[81] That principle was originally derived from British law including the House of Lords decision in *Garland v British Rail Engineering Ltd.*[82]

58. Where Australian courts interpret domestic statutes that use terms drawn from international treaties, they generally (but not invariably) apply the rules of interpretation applicable to treaties (that is, arts 31-33 of the *Vienna Convention on the Laws of Treaties*).[83] Similarly, the UK Supreme Court has interpreted international treaties in accordance with that Convention and construes words in context

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79 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363-364, quoting *Grenada County Supervisors v Brogden* (1884) 112 US 261 at 269. See also *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287.

80 *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26; [2008] AC 153 at 192 [45].

81 *Chu Kheng Lim v Minister for Immigration, Local Government & Ethnic Affairs* (1992) 176 CLR 1 at 38; *Pilkington (Australia) Ltd v Minister for Justice and Customs* [2002] FCAFC 423; (2002) 127 FCR 92 at 99-101 [25]-[28].

82 [1983] 2 AC 751 at 771.

83 *Commonwealth v Tasmania* (1983) 158 CLR 1 at 93-94; *Addy v Federal Commissioner of Taxation* [2021] HCA 34; (2021) 273 CLR 613 at 629 [23], citing *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* [2006] HCA 53; (2006) 231 CLR 1 at 14 [34]. See also *Acts Interpretation Act 1901* (Cth) s 15AB(2)(d).

so as to give them a meaning which is consistent with the object, purpose and humanitarian aims of the instruments.[84]

59. There is significant commonality in our courts' approaches to the interpretation of international treaties, arising from our involvement in international frameworks for legal cooperation. For example, in *Al-Sirri v Home Secretary*,[85] when interpreting whether a refugee was excluded from the protection of the *Refugee Convention*, the UK Supreme Court refused to accept that each member state could adopt their own meaning of the words "serious reasons for considering" in Art 1F of the Convention. Rather, it held that the words must have an "autonomous" meaning consistent with UNHCR guidance.[86] This judgment was relied on by the High Court of Australia in assessing a similar case concerning a claim for refugee status under Australian law, which involved interpreting the *Refugee Convention*. The High Court noted the risk of using "domestic standards of proof as analytical tools" because they can "evolve into substitutes for the words of the Article [in the Convention]".[87] In recent years, however, the Court's ability to give direct effect to the

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84 *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Comr for Refugees intervening)* [2005] 2 AC 1 at 30-31 [18]; *R v Asfaw (United (United Nations High Comr for Refugees intervening)* [2008] UKHL 31; [2008] AC 1061.

85 [2012] UKSC 54; [2013] 1 AC 745.

86 *Al-Sirri v Home Secretary* [2013] 1 AC 745 at 790 [75].

87 *FTZK v Minister for Immigration* [2014] HCA 26; (2014) 88 ALJR 754 at 761 [15].

Refugee Convention has been diminished by legislative reforms which have removed almost all references to the Convention and specifically clarify the Australian Government's preferred interpretation of its obligations under international law.[88]

(2) Statutory human rights

60. An important difference between the Australian and UK legal systems is the UK's domestic implementation of the European Convention on Human Rights in the *Human Rights Act 1998* (UK). In Australia, at the Federal level, instead of an analogue to the *Human Rights Act* or a constitutional Bill of Rights, there are numerous statutes giving effect to Australia's obligations under international conventions to varying extents, including with respect to race, sex, age and disability discrimination.[89] At the state level, three of the Australian States and Territories, the Australian Capital Territory, Victoria and Queensland, have enacted Charters of Rights based on the UK legislation.[90] However, the scope of those State Acts was

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88 See s 197C(1) of the *Migration Act 1958* (Cth) introduced by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth), as discussed in Crock and Bones, "The Creeping Cruelty of Australian Crimmigration Law" (2022) 44 *Sydney Law Review* 169 at 170-171.

89 French, "Australia and International Law" (2020) 5 *Perth International Law Journal* 1 at 12.

90 *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2019* (Qld).

significantly affected by the High Court's decision in *Momcilovic v The Queen*.[91]

61. That case addressed the Victorian state analogue to s 3 of the UK Act, concerning the interpretation of domestic statutes, and s 4 of the UK Act, concerning declarations of incompatibility. As to the analogue to s 3, the High Court considered whether a remedial interpretation of a statutory provision, of the kind adopted in the House of Lords in *Ghaidan v Godin-Mendoza,*[92] could be applied. Six of the seven justices concluded that a remedial interpretation was not available in the Australian context. French CJ, and Gummow J (with whom Hayne J agreed) explained their rejection of the United Kingdom approach by reference to the different constitutional setting in Australia, which did not permit departure from the established approaches to statutory interpretation.[93] Gummow J referred in particular to the fact that "Diceyan notions of parliamentary supremacy" in the United Kingdom have been displaced in the Australian Constitution. He concluded that principles of statutory construction precluded the analogue to s 3 from conferring upon the courts a function of a law-making character, namely, allowing a

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91 [2011] HCA 34; (2011) 245 CLR 1.

92 [2004] UKHL 30; [2004] 2 AC 557.

93 [2011] HCA 34; (2011) 245 CLR 1 at 49-50 [49]-[50], 89-90 [155]-[158].

remedial interpretation of a statutory provision in order to render the provision compatible with international law.[94]

62. As to the analogue to s 4 of the UK Act, the justices held a multiplicity of views, particularly as to whether a declaration by a court that a statute is incompatible with a human right involved the exercise of judicial power. A majority of the court held that such a declaration was neither an exercise of judicial power nor an incidental exercise of such power.[95] That conclusion may seem odd, given that in many jurisdictions around the world courts make determinations that particular statutes are incompatible with human rights. However, it is important to recognise that the conception of judicial power that derives from the Australian Constitution is constrained by the separation of powers in that written Constitution. Relevantly, "the object of the judicial process is the final determination of the rights of the parties to an action",[96] such that advisory opinions are generally not seen to be an exercise of judicial power. Thus, in *Momcilovic*, the statutory provision that invested a State court[97] with the power to provide formal *advice* to the

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94 [2011] HCA 34; (2011) 245 CLR 1 at 92-93 [171].

95 [2011] HCA 34; (2011) 245 CLR 1 at 65 [89]-[89] (French CJ, Bell J agreeing at 241 [661]), 95-96 [181]-[188] (Gummow J, Hayne J agreeing at 123 [280]), 172 [431] (Heydon J).

96 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 355-356 [47].

97 In Australia, State as well as Federal courts may not be invested with powers that are incompatible with their exercise of Commonwealth judicial power: *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

Attorney-General that a particular statute was incompatible with human rights was analysed to confer a non-judicial power on the Court.

63. From an Australian perspective, the UK position seems quite different. As noted by Lord Lloyd-Jones,[98] the *Human Rights Act* does not simply require courts to give effect to the treaty obligations of the UK. It also requires courts to rule on issues of international law, even though that international law may not have been implemented into UK domestic law. For example, in *Al-Saadoon v Secretary of State for Defence*,[99] the Court of Appeal was required to resolve substantive issues under the UN *Convention for the Protection of All Persons from Enforced Disappearance*, notwithstanding that the UK is not a signatory to that Convention. That was because that instrument had influenced key rights under the European Convention.[100]

64. The domestic implementation of international human rights law has also expanded the range of justiciable matters in UK courts, such as the possibility of judicial inquiry into the legality of foreign

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98 Lloyd-Jones, "International Law before United Kingdom Courts: A Quiet Revolution" (2022) 71 *International and Comparative Law Quarterly* 503 at 505.

99 [2016] EWCA Civ 811; [2017] QB 1015.

100 [2016] EWCA Civ 811; [2017] QB 1015, 1068-1071 [149]-[158].

invasions.[101] The impact of this greater scope for justiciability is made clear in a recent decision in the UK Supreme Court, concerning whether the Government's policy of relocating asylum seekers to Rwanda contravened provisions of the Immigration Rules which prohibit non-refoulement of asylum seekers in accordance with international law. The Court held that it was required to make its own assessment of whether asylum seekers are at risk of refoulement (rather than deferring to the government's assessment).[102] Furthermore, the Court found substantial grounds for believing that there was a real risk that asylum claims would not be determined properly, and that asylum seekers would in consequence be at risk of being returned directly or indirectly to their country of origin.[103]

65. By contrast, in November 2023, the High Court of Australia held that the indefinite detention of an asylum seeker, for whom there was no real prospect of removal from Australia either to his country of origin or a third country, contravened the Australian Constitution. The Court reasoned that such detention went beyond what was reasonably capable of being seen as necessary for a legitimate and non-punitive purpose, and therefore exceeded the Executive's

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101 *R (Gentle) v Prime Minister* [2008] UKHL 20; [2008] 1 AC 1356.

102 *R (on the application of AAA and others) v Secretary of State for the Home Department* [2023] UKSC 42 at [57].

103 *R (on the application of AAA and others) v Secretary of State for the Home Department* [2023] UKSC 42 at [105].

incidental power to exclude, admit and deport aliens under the Constitution.[104] Without an analogue to the UK *Human Rights Act*, this decision was reached entirely by reference to domestic legal sources, rather than international or human rights law.

IV Conclusion

66. It is tempting to think that all law is domestic because Australian and UK courts can only really engage with international legal norms to the extent that they are enforceable under domestic law. International law, the argument runs, is therefore of a lesser relevance to the modern lawyer.

67. The experience of the High Court in the last two years challenges that view. In its engagement with international law, the High Court has accepted that treaties and conventions provide a framework and impetus for the Court to see itself as part of an international legal community. In the cases that I have discussed, the High Court engaged closely with international legal precedent across the leasing of aircraft engines, commercial arbitration, foreign bribery and child abduction in order to inform the content of Australian law.

68. The significant role of international law in cross-border trade, arbitration, insolvency and human rights protection provides the

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104 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37 at [44]-[55], [70].

basis for an ever-growing international jurisprudence on questions which will arise in many jurisdictions. To adopt the views expressed by former Australian Chief Justice French, I would encourage practitioners to become comfortable with learning from each other's experiences, as this will strengthen the discriminating use of comparative law in domestic decision-making.[105]

69. Of course, I am aware that in the light of what I discussed earlier, those of you in the UK are likely already very comfortable with the concept of directly engaging with international law having regard to the European Convention on Human Rights. As noted by Lord Lloyd-Jones, judges in England and Wales are "definitely in the front line" in the determination of issues of international obligations and relations which are required by the Human Rights framework.[106]

70. However, I wonder whether recent political events and debate in the United Kingdom may reduce the trend towards what Lord Lloyd-Jones has identified as an increased judicial openness toward international law.

71. Writing recently in *The Spectator*, Lord Sumption observed that, putting aside the partisan debates concerning the UK's continued

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105 French, "Australia and International Law" (2020) 5 *Perth International Law Journal* 1 at 13.

106 Lloyd-Jones, "International Law before United Kingdom Courts: A Quiet Revolution" (2022) 71 *International and Comparative Law Quarterly* 503 at 522.

adherence to the European Convention on Human Rights, the key point is that the UK did not need it at all. His Lordship claimed that there was nothing in the Convention that you could not enact by ordinary domestic legislation, and argued that the real purpose of the Convention was to make the UK enforce rights which are potentially unwanted and for which there may be no democratic mandate.[107]

72. It is not for me to comment on the political or legal merits of such a position. But Lord Sumption's comments give us cause to consider whether modern political trends involve a "backslide" to the domestic legal norms, and away from international legal comity. In any event, the experience of the High Court makes clear that whether we like it or not, the prevalence of domestic disputes that raise issues of international law means that it is impossible for courts to be hermetically sealed from other jurisdictions and the global legal order, and will require practitioners to be "international lawyers".

73. It may be tempting to think that there *isn't* really such a thing as international law, because it is only applied insofar as such international norms are integrated into domestic law. But I hope that, by sharing the High Court's recent engagement with international law with you today, I have challenged that assumption.

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107 Jonathan Sumption, "Judgment call: the case for leaving the ECHR", *The Spectator (UK)* 30 September 2023.